Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE Telephone Operators GTOC Tariff No. 1 GTOC Transmittal No. 1148	)	CC Docket No. 98-79
BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1 BellSouth Transmittal No. 476	)	CC Docket No. 98-161
Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128 Pacific Transmittal No. 1986	)	CC Docket No. 98-103

JOINT OPPOSITION OF
INTERMEDIA COMMUNICATIONS INC. AND
e.spire COMMUNICATIONS, INC.

Intermedia Communications Inc. and e.spire Communications, Inc. (collectively, the "Joint Parties"), by their undersigned counsel, hereby submit their comments in the above-captioned dockets.

I. INTRODUCTION

Intermedia is the largest independent facilities-based competitive local exchange carrier ("CLEC") in the nation. In addition to providing local and long distance voice services, Intermedia provides a variety of advanced telecommunications services, including asynchronous transfer mode ("ATM"), frame relay, integrated services digital network ("ISDN"), and Internet access, over its extensive data network. To date, Intermedia has deployed over 150 data switches and 20 voice switches throughout the country. Additionally, Intermedia owns DIGEX, one of the country's largest Internet service providers ("ISPs").

e.spire similarly is a large, independent, facilities-based CLEC. e.spire presently offers integrated packages of local and long distance voice and data services, as well as Internet access services, to end users in more than thirty markets located in twenty states. Presently, e.spire's facilities consist of nearly 1,500 route miles of fiber in its 32 local networks, 44 ATM switches, 17 local voice switches, and approximately 22,000 route miles of broadband backbone. e.spire's advanced data and Internet access services are available on an even wider basis.

As carriers that are heavily focused on packet-based networks to provide voice, data, and Internet services, the Joint Parties are critically concerned about any Commission action that could reverse 15 years of Commission decisions regarding the local nature of telecommunications transmissions to ISPs.

II. THE TARIFF FILINGS OF GTE, BELLSOUTH, PACIFIC BELL, AND MOST RECENTLY, BELL ATLANTIC, RAISE ISSUES THAT MUST BE ADDRESSED IN A RULEMAKING PROCEEDING, NOT IN DISPARATE TARIFF INQUIRIES

The three ILEC ADSL tariff filings that are the subject of the instant proceedings raise identical issues, as does the recent proceeding initiated by the Commission regarding Bell Atlantic's DSL product. Indeed, Bell Atlantic's DSL filing makes clear that the issues raised in these proceedings are not limited to a few isolated ILECs, but rather raise issues that will affect the entire industry. While the Commission maintains that these proceedings apply only to the dedicated ADSL services specified in the ILEC tariffs, the Joint Parties believe that any Commission decision regarding dedicated ADSL service between ISPs and their subscribers could impact mutual compensation arrangements for dial-up calls to ISPs on CLEC networks. As the Commission is well aware, ILECs have refused to pay mutual compensation to CLECs for this traffic, as negotiated or arbitrated in their interconnection contracts, in spite of 15 years of

Commission decisions and 21 state commission decisions to the contrary.[1] Any decision by the Commission on the narrow issue presented in these tariffs would almost certainly be used inappropriately by the ILECs to further back away from their interconnection contract commitments and support their continued refusal to pay local termination charges as directed by the states.

Moreover, the ILECs' argument that local calls do not terminate at the ISP, but rather terminate at the location of any database accessed by the Internet subscriber, opens the door to myriad issues that are beyond the scope of these tariff investigations. For example, would a decision accepting the ILECs' arguments constitute a reversal of the FCC's long-held position that an ISP is an end user, and not a carrier? Since calls processed by ISPs typically involve net protocol conversion, would treatment of ISP calls as interLATA require changes in the FCC's rules to now treat net protocol conversion as a "basic" (or "telecommunications") rather than "enhanced" (or "information") service? As several Bell operating companies ("BOCs") are acting as ISPs through affiliate relationships, would any current BOC offering under Open Network Architecture ("ONA") rules need to be shifted to a section 272 affiliate under the Act?[2] Each of these issues requires serious investigation and requires a full notice and comment proceeding before changes can be made to the underlying Commission rules.

Each of the above issues raises many sub-issues that are substantial in their own right, such as: How would any such decision impact other enhanced service providers? Moreover, as drafted, the ILEC tariffs are not limited to providing ADSL links to ISPs, but rather these

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1 The 21 states that have ruled on this issue include Arizona, Colorado, Connecticut, Florida, Illinois, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.

2 A more fundamental question might be: "Does the existence of BOC ISP affiliates providing "interLATA" services violate section 271 of the Communications Act?"

services are available to other end users. How would any Commission decision affect non-ISP users of the same service? Would they (non-ISPs) become "carriers" as well? If so, would such a decision impose universal service contribution obligations on a whole new class of users?

The questions presented raise discrimination issues as well, as all of the ILECs subject to this inquiry have ISP subsidiaries. How will ILECs demonstrate that their ISP subsidiaries obtain the ADSL service on the same rates, terms, and conditions as competing ISPs? Will ILECs file ONA plans to demonstrate that they are not discriminating against competing ISPs? What steps will the Commission have to take in order to ensure that consumers retain choice of their preferred ISP and are not forced to take service from the ILEC subsidiary?

Finally, the Joint Parties note that most parties concede that, after a call is routed to an ISP, the following ISP-directed transmissions across the world wide web access local, interstate, and international databases, often within the same session. (The Joint Parties emphasize that this routing across the world wide web is an enhanced service provided by the ISP, wholly separate from the telecommunications link between the end user and the ISP.) The ILEC direct cases provide no substantive information regarding whether it is possible to distinguish and measure the jurisdictional destination of segments of Internet sessions. Under well-settled case law, if it is technically feasible to do so, traffic must be separated by jurisdiction.[3] Thus far, no adequate basis on the record of this proceeding is available to make such a determination.

Given the profound impact that any Commission decision on these jurisdictional issues could have on myriad other Commission policies, any Commission action on the merits should be conducted through an inquiry or rulemaking, and not through the instant tariff investigations. Indeed, using a tariff investigation to reach the merits on a question that could

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[3] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 371 (1986).

change 15 years of Commission rulings would invite objections from the industry that the Commission was "unfairly effectuating a general policy change without the necessary industry-wide data and commentary,"[4] and would place the Commission decision at severe risk of reversal on appeal. Thus, if the Commission does decide to reach the merits of these issues, the Commission should first develop a robust record through a proper inquiry or rulemaking proceeding. In doing so, the Commission could initiate a new notice of inquiry or notice of proposed rulemaking, or could expand the record of a pending proceeding – such as the pending "706 Rulemaking" in CC Docket No. 98-147 – by soliciting additional comments on these issues.

III. IF THE COMMISSION CHOOSES TO DECIDE THE JURISDICTIONAL NATURE OF INTERNET TRAFFIC IN THE INSTANT PROCEEDINGS, IT MUST FIND THAT DIAL-UP CALLS TO ISPs CONSTITUTE LOCAL, EXCHANGE TRAFFIC

As discussed in the previous section, established precedent requires that the Commission not address the merits of the ILECs' arguments on the jurisdictional nature of telecommunications to ISPs in the instant proceedings, but rather should address the issue in the context of a broad notice and comment proceeding. If the Commission nevertheless does choose to address the merits of the ILEC arguments, however, it should expressly find that dial-up calls from end users to ISPs are local, exchange traffic.

A fundamental flaw in the ILECs' logic lies in the network architecture utilized to provide ADSL services. What is unclear from ILEC proposals is that the ADSL service shares use of the local loop with traditional residential and business service. The same local loop used to provide ADSL is used by the ILEC to provide dial tone in association with local exchange service.

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[4] *Wisconsin Gas C. v. FERC*, 770 F.2d 1144 (DC Cir. 1985). *See also Quivira Mining Co. v. NRC*, 866 F.2d 1246, 1261 (10th Cir. 1989); *Hercules Inc. v. EPA*, 598 F.2d 97 (DC Cir. 1978).

Any regulatory treatment must recognize this fact. Any attempt to "carve out" a portion of the local loop and declare part of that loop to be local and part of it to be interstate invites protracted litigation over such issues as jurisdictional separations of ILEC network costs.

Recent testimony submitted on behalf of BellSouth in a pending Alabama proceeding on mutual compensation for dialup ISP traffic illustrates that ILECs are indeed anticipating that any Commission decision in the instant proceeding will support their arguments that they are not obligated to pay mutual compensation for such traffic. In the Alabama proceeding, the BellSouth witness stated that:

> Many of the state commissions that have examined this issue [of mutual compensation for dialup ISP-bound traffic] have recognized that the matter is currently before the FCC and have indicated that their determinations may be subject to change once the FCC issues a ruling on the jurisdictional nature of ISP Internet traffic and on the question of whether CLECs are entitled to reciprocal compensation for calls to the Internet that are placed through an ISP to which they provide local exchange service. These issues are before the FCC in at least two proceedings. *In the investigation of GTE's DSL tariff, the FCC is required to rule on the jurisdictional issue by October 30, 1998, at the latest.*
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> As recently as August 27, 1998, the FCC indicated that it intends "promptly" to address the question of whether calls to ISPs are subject to the FCC's jurisdiction. The FCC also stated that its decision might not be dispositive of whether ISP Internet traffic is subject to reciprocal compensation. If, for instance, the FCC were to decide that Internet access traffic is not subject to tariffing at the interstate level, this would not constitute a finding that such traffic is subject to reciprocal compensation. *Should the FCC decide, however, that calls to ISPs are jurisdictionally interstate, this would necessarily require a finding that the traffic does not originate and terminate within a local exchange area.*[5]

[5] Rebuttal Testimony of Albert Halprin on Behalf of BellSouth Telecommunications, Inc., filed with the Alabama Public Service Commission in Docket No. 26619 on August 31, 1998, at 17-19 (footnotes omitted, emphasis added).

In any event, the Commission can be sure that, if it issues a decision in the instant proceedings that simply states that traffic to an ISP that is routed over dedicated ADSL lines is inherently interstate in nature, the ILECs will use such a decision to justify continued refusal to pay mutual compensation amounts currently due to CLECs under negotiated and arbitrated interconnection agreements.

Such an outcome – unless the Commission clarifies that any jurisdictional decision applies only to dedicated services and does not affect mutual compensation arrangements under existing interconnection agreements – would have an enormously disruptive impact on the CLEC industry. First, the mutual compensation amounts currently owed by ILECs to CLECs are substantial, with total unpaid CLEC invoices totaling millions of dollars. While these amounts may not be large in comparison to total ILEC revenues, they are very substantial when compared to typical CLEC revenues. The impact of ILEC recalcitrance is also distributed nationwide – while some ILECs in some states have paid the amounts owed to CLECs, the majority have not. Significantly, the three ILECs that are the subject of the Commission's current tariff inquiries all have refused to pay in full mutual compensation amounts due to the Joint Parties, with current unpaid invoices totaling millions of dollars.

Second, without such a clarification, a limited Commission finding that dedicated traffic to ISPs is inherently interstate would cause CLECs to expend substantial amounts in litigation before state regulators and federal district courts to pursue their rights to compensation for dial-up traffic. CLECs have already incurred enormous costs to date, pursuing complaints in 21 states, and defending their rights to collect mutual compensation for dial-up ISP traffic in several district courts. While every single one of these efforts have been successful to date, and supported the CLECs' rights to collect mutual compensation, a Commission decision limited to dedicated ADSL traffic would embolden the ILECs to relitigate the matter in venues that have

already decided the issue, and would promote additional litigation in other venues. This would result in an unwarranted drain on the resources of CLECs and state regulators alike. The Commission must not allow this to occur and must clearly state as a matter of policy and law that any future changes in network architecture or tariffing of services cannot be used to retroactively change interconnection agreements negotiated between parties and approved by the states.

Such a finding is also clearly consistent with the stated intentions of the Commission. In a recent filing to the United States District Court in North Carolina, the Commission made clear that it has not yet made a determination as to the jurisdictional nature of ISP-bound telecommunications traffic, and that it has no intention of disrupting mutual compensation arrangements established pursuant to state regulatory authority:

> The FCC notes that the jurisdictional issue before it in the [instant GTE] tariff proceeding does not involve application of the reciprocal compensation provisions for section 251(b)(5) or interpretation of the terms of an interconnection agreement. Moreover, *the proper construction of the specific compensation agreement previously entered into between the parties would not necessarily turn on a subsequent determination by the FCC with respect to its jurisdiction over ISP traffic.*[6]

In so stating, the Commission made clear that it had no intention of determining issues relating to the payment of current or future mutual compensation agreements for the transport and termination of dial-up calls to ISPs located on CLEC networks that were established in interconnection arrangements negotiated or arbitrated under sections 251 and 252 of the Communications Act. Moreover, the Commission cited the order of the United States Court of Appeals for the Eighth Circuit, noting that per the Court's order, the Commission "lacks jurisdiction, except in limited circumstances, to enforce interconnection agreements under section

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[6] Response of Federal Communications Commission as Amicus Curiae to Motion for Referral of Issue; filed in *BellSouth Telecommunications, Inc. v. US LEC of North Carolina, L.L.C.*, Civil Action No. 3:98CV170-MU (D. Charlotte, W.D.N.C.) on Aug. 24, 1998, at 6 (citations omitted, emphasis added).

251 and 252 [of the Communications Act]."[7] The Commission's intent not to disrupt existing ISP mutual compensation arrangements is further evidenced in recent statements by Chairman Kennard that were reported by Telecommunications Reports:

> "Some people who are saying" the FCC should decide "how the money flows" between incumbent telcos and CLECs are the same people who, during court challenges of the FCC's docket 96-98 "carrier interconnection" order, said "we didn't have the jurisdiction," Mr. Kennard said. In any event, interconnection agreements governing the exchange of ISP traffic "will expire in about a year," and the issue can be renegotiated by the carriers, he said.[8]

Finally, the Eighth Circuit similarly has weighed in on the nature of calls between ISPs and their subscribers, noting "ISPs subscribe to LEC facilities in order to receive *local calls* from customers who want to access the ISP's data."[9] Thus the clear weight of FCC precedent, state commission decisions, and the recent Eighth Circuit decision all come to the exact same conclusion: Calls from subscribers to their ISP are local and therefore properly tariffed at the state level. Any other conclusion would be contrary to this unanimous body of authority and needlessly disruptive to the industry.

IV. CONCLUSION

For all these reasons, the Commission should not decide the merits of the ILEC arguments that dedicated ADSL-based traffic to ISPs is inherently jurisdictionally interstate in the instant proceedings, but should instead consider the issue in a broader rulemaking proceeding. If the Commission does address the merits of the ILEC jurisdictional arguments in the instant cases, however, it should also issue an affirmative and unequivocal finding that dial-up calls to ISPs

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7 *Id.* at 6 n.8.

8 Telecommunications Reports, Sept. 7, 1998, at 28.

9 *Southwestern Bell Telephone et al. v. Federal Communications Commission*, Slip Op. No. 97-2618 at n.9 (8th Cir. Aug. 19, 1998).

located within the same calling area as the calling end user are local, exchange traffic, and that the compensation for such calls is determined by state regulators. The Commission also should find that this decision applies to dial-up calls to ISPs within expanded area service areas served by ILECs. Finally, the Commission should affirmatively state that any decision it makes in the instant proceeding does not nullify any decision by a state regulatory body or federal court that directs ILECs to pay mutual compensation for dial-up ISP traffic to CLECs, and that the Commission lacks the authority to effect such nullification. Such a finding is the minimum necessary to prevent severe disruption to the competitive local services industry.

Respectfully submitted,

By: _____

Brad E. Mutschelknaus
Jonathan E. Canis
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600

Counsel for
INTERMEDIA COMMUNICATIONS INC. &
e.spire COMMUNICATIONS, INC.

September 18, 1998

CERTIFICATE OF SERVICE

I, Arethea P. Johnson, hereby certify that I have served a copy of the "Joint Opposition Of Intermedia Communications Inc. And e.spire Communications, Inc." this 18th day of September, 1998, upon the following parties via hand delivery:

Federal Communications Commission
Competitive Pricing Division
Common Carrier Bureau
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Janice M. Myles
Federal Communications Commission
Common Carrier Bureau
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

Arethea P. Johnson